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Pro Se Defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRISTINE CHANG,
individually and as Guardian Ad
Litem for ERIC SUN, disabled,

Plaintiffs,

vs.

ROCKRIDGE MANOR
CONDOMINIUM et al.

Defendants.

No. C 07 4005 EMC

NOTICE OF MOTION AND
MOTION TO DISMISS FOR LACK OF
JURISDICTION OVER THE SUBJECT
MATTER AND/OR FAILURE TO
STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED AND IN
THE ALTERNATIVE, FOR A MORE
DEFINITE STATEMENT
[FRCP 12(b)(1) and (6) and 12(e)]

Date: 11/28/07
Time: 10:30 a.m.
Courtroom: C

TO PLAINTIFFS IN PRO PER:

PLEASE TAKE NOTICE that on November 28, 2007 at 10:30 a.m. or as soon
thereafter as the matter may be heard in the above-entitled court, located at 450 Golden

DEFENDANT ALBERT COOMBES' MOTION
PURSUANT TO FRCP 12(b) 1 & 6 and 12(e)

1 Gate Avenue, San Francisco, California 94102, defendant Albert Coombes will move the
2 court to dismiss the action pursuant to FRCP 12(b)(1) and 12(b)(6) because of lack of
3 jurisdiction over the subject matter and because plaintiffs' complaint fails to state a claim
4 upon which relief can be granted, on the grounds that:

5 1. Although plaintiffs' complaint alleges violations of their civil rights, privileges
6 and immunities guaranteed under the Fourth, Fifth, Sixth, Seventh and Fourteenth
7 Amendments to the Constitution, none of the allegations directed to this answering
8 defendant are in any way connected to any such violations.

9 2. Plaintiffs have failed to state facts sufficient to sustain causes of action for
10 malicious prosecution/abuse of process, negligence, conspiracy to defraud and fraud
11 against this answering defendant.

12 3. On the face of their complaint, plaintiffs have admitted that the statute of
13 limitations has run on their claims for civil rights violations, negligence, malicious
14 prosecution and abuse of process against this answering defendant.

15 In the alternative, defendant requests a more definitive statement pursuant to
16 FCRP 12(e) because plaintiffs' complaint is so indefinite and uncertain that defendant
17 cannot ascertain the nature of the claim being asserted and therefore cannot reasonably be
18 expected to frame a proper response.

19 The motion will be based on this Notice of Motion and Motion, the Memorandum
20 of Points and Authorities filed herewith, and the pleadings and papers filed herein.

21 DATED: October 8, 2007

22
23 /S/ ALBERT COOMBES
24 ALBERT F. COOMBES
Pro Se Defendant

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DEFENDANT ALBERT COOMBES' MOTION
PURSUANT TO FRCP 12(b) 1 & 6 and 12(e)

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF ISSUES

The issues to be decided in this motion are:

1. Is plaintiffs' federal claim insubstantial?
2. Have plaintiffs pled sufficient facts against this defendant to successfully allege that he violated their civil rights, privileges and immunities guaranteed under the Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments of the Constitution and Title 42 U.S.C. Section 1983?
3. Have plaintiffs pled sufficient facts against this defendant to allege prima facie causes of action for malicious prosecution, abuse of process, negligence, conspiracy to defraud and fraud?
4. Does plaintiffs' admission in their complaint that this defendants alleged wrongful acts occurred prior to September 10, 2004, negate their claims for civil rights violations, negligence, malicious prosecution and abuse of process because they are time-barred by the applicable Statute of Limitations?
5. Is the plaintiffs' complaint so indefinite and uncertain that the nature of the claim being asserted against this defendant cannot be ascertained and therefore defendant cannot reasonably be expected to frame a proper response?

II

RELEVANT FACTS

In Paragraph 1 of their complaint, plaintiffs state that they are seeking monetary damages for violations of the civil rights, privileges and immunities guaranteed under the Fourth, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America and Title 42 U.S.C. Section 1983 and that jurisdiction is based

on 28 U.S.C. Section 1331 and 1343 (a)(1)(3), (4).

Plaintiffs thereafter devote only two paragraphs of purported factual allegations against this defendant.

Paragraph 109 (quoted verbatim) states: “Plaintiffs’ fifth attorney Albert Coombes who Pamela Zimba consulted closely in every processes and legal proceeds. One month before Rockridge Manor trial was to begin¹. Zimba held Plaintiff Chang by duress insisted Plaintiff Chang hiring Albert coombes with a retainer of \$7,500, or otherwise, Zimba were to stop representing Plaintiffs immediately. When Plaintiffs settled with Defendants Rockridge Manor without trial, Albert Coombes represented Plaintiffs for about a week taking one expert witness’ deposition, but extorted the total \$7,500 with falsified accountings.”

Paragraph 110 (quoted verbatim) states: “Upon information and belief and allegations, Albert Coombes was liable to Plaintiffs’ injuries for Pamela Zimba’s intentional, malicious, reckless, wanton, fraudulent representation. Plaintiff Chang witnessed Zimba’s constant consultation of Albert Coombes on every processes and legal proceedings.”

On the basis of what is alleged in these two paragraphs, plaintiffs have sued this defendant for: 1. Violations of their civil rights under the Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution; 2. Malicious Prosecution/Abuse of Process; 3. Negligence; 4. Conspiracy to defraud; and 5. Fraud.

III

ARGUMENT

A. Federal Jurisdiction:

If a federal claim is “insubstantial,” it cannot serve as the basis for “federal question” jurisdiction when the question presented is too insubstantial to consider.

¹In Paragraph 107 of the complaint, plaintiffs allege the trial was to begin on September 10, 2004.

[Hagans v. Lavine (1974) 415 US 528, 537-538, 94 S.Ct. 1372, 1379-1380; Cook v. Peter Hiewit Sons Co. (9th Cir. 1985) 775 F2d 1030, 1035.]

A federal claim is not “colorable” if it “clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or ... is wholly insubstantial and frivolous.” [Bell v. Hood (1946) 327 US 678, 682-683, 66 S.Ct. 773, 776; Musson Theatrical, Inc. V. Federal Express Corp. (6th Cir. 1996) 89 F3d 1244, 1248.]

Mere allegations that plaintiffs were denied certain rights do not raise “colorable” constitutional claims. Plaintiffs must allege facts showing the basis on which their civil rights claim is based. [Hoye v. Sullivan (9th Cir. 1993) 985 F2d 990, 991.]

In their complaint, the plaintiffs have done no more than mouth the words “violations of civil rights” Nowhere, with regard to this defendant, do they allege facts showing the basis for their civil rights claim.

Therefore, jurisdiction should be denied for failure to raise a colorable constitutional claim by alleging sufficient facts showing the basis for the claim.

B: Did Plaintiffs Alleged Sufficient Facts Showing This Defendant Violated Their Civil Rights?

In the aforementioned two paragraphs devoted to this defendant, plaintiffs have failed to allege any facts on which to base a claim for violation of their civil rights.

They have done no more than accuse him of charging too much for his services.

C: Have Plaintiffs Alleged Sufficient Facts To Substantiate Claims For Malicious Prosecution/Abuse Of Process, Negligence, Conspiracy To Defraud And Fraud Against This Defendant?

(i) Malicious Prosecution/Abuse of Process

The tort of Malicious Prosecution involves the malicious commencement of a civil proceeding which is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice.

The following elements must be shown: 1. Favorable termination of a prior

proceeding; 2. Lack of probable cause; and 3. Malice. [Williams v. Coombs (1986) 179 Cal.App.3d 626.]

None of these elements appear in plaintiffs allegations against this defendant.

The tort of Abuse of Process is committed by the misuse of process, such as attachment or injunction. [Tranchina v. Arcinas (1947) 78 Cal.App.2d 522, 524.]

The essence of the tort is “misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.” [Meadows v. Bakersfield Savings & Loan Co. (1967) 250 Cal.App.2d 749, 753.]

Like Malicious Prosecution it requires the element of malice which may be inferred from the wilful act in the use of the process not proper in the regular conduct of the proceeding. [Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 C.2d 461, 466; Weisenburg v. Molina (1976) 58 Cal.App.3d 478, 489.]

Plaintiffs have failed to allege any of the above these elements against this defendant.

(ii) Negligence

Negligence involves the elements of duty, breach, causation and damages.

Plaintiffs’ Third Cause of Action alleges in general terms that each and every defendant owed a duty of care to the plaintiffs which they breached.

However, the factual allegations against this defendant merely state that he somehow extorted \$7,500.00 out of the plaintiffs for work he did on their case. Such allegations either sound in contract or fraud not negligence.

(iii) Conspiracy to Defraud and Fraud

In all averments of fraud, the circumstances constituting the fraud shall be stated “with particularity.” Fraud must be pled “with a high degree of meticulousness.”

[FRCP 9(b); Desaigoudar v. Meyercord (9th Cir. 2000) 223 F3d 1020, 1022-1023.]

Fraud averments failing to meet the Rule 9(b) standard are disregarded, and the remaining allegations evaluated to see if a valid claim has been stated. [Vess v. Ciba-Geigy Corp. USA (9th Cir. 2003) 317 F3d 1097, 1105.]

1 Allegations that are vague or conclusory are insufficient to satisfy the
 2 “particularity” required by Rule 9(b). [*Moore v. Kayport Package Express, Inc.* (9th Cir.
 3 1989) 885 F2d 531, 540; *Wool v. Tandem Computers, Inc.* (9th Cir. 1987) 818 F2d 1433,
 4 1439.]

5 Rule 9(b) is usually interpreted to require that the plaintiffs include in their
 6 complaint facts specifying the alleged fraudulent allegations; allegations that the
 7 representations were false when made; the identity of the speaker; when and where the
 8 statements were made; and the manner in which the representations were false and
 9 misleading. [*In re GlenFed, Inc. Secur. Litig.* (9th Cir. 1994) 42 F3d 154, 1547, fn.7 (en
 10 banc); *DiLeo v. Ernst & Young* (7th Cir. 1990) 901 F2d 624, 627; *Arnold & Assocs., Inc.*
 11 *v. Misys Healthcare Systems, a div. of Misys, PLC* (D AZ 2003) 275 F.Supp.2d, 1013,
 12 1018 (citing text).]

13 Here plaintiffs have failed to follow the Rule 9(b) requirements. The conclusory
 14 allegations in their Fourth and Fifth Causes of Action are insufficient to state a complaint
 15 for fraud or conspiracy to defraud.

16 **D: Are The Plaintiffs’ Claims For Violation Of Their Civil Rights, Negligence,**
 17 **Malicious Prosecution And Abuse Of Process Time-Barred?**

18 California Code of Civil Procedure §335.1 provides for a two-year limitations
 19 period for negligence, malicious prosecution and abuse of process. Further, CCP §335.1
 20 has been borrowed by the federal courts in California for use in 42 USCS §1983 cases.
 21 [*Washington v. Cambra* (2003, ND Cal) 2003 US Dist Lexis 20336 citing *Wilson v.*
 22 *Garcia*, 471 U.S. 261, 276, 85 L.Ed.2d 254, 105 S.Ct. 1938 (1985); *Elliott v. City of*
 23 *Union City* (9th Cir. 1994) 25 F3d 800, 802.]

24 With regard to this defendant’s alleged action, plaintiffs state in Paragraph 107
 25 that the Rockridge Manor trial was set for September 10, 2004. Then, at Paragraph 109
 26 they state that one month before the Rockridge Manor trial was to begin they hired Albert
 27 Coombes with a retainer of \$7,500. They add that when they settled with Rockridge
 28 Manor, Albert Coombes had represented them for about one week.

1 This would mean that any action against this defendant controlled by the
 2 CCP§335.1 two-year limitations period would have had to have been filed on or before
 3 September/October, 2006. Plaintiffs filed their complaint on August 3, 2007, almost one
 4 year beyond the statute.

5 **E: The Plaintiffs' Complaint Is So Indefinite And Uncertain That This**
 6 **Defendant Cannot Reasonably Be Expected To Frame A Proper Response?**

7 Plaintiffs complaint is against 16 defendants who are lumped together in a
 8 meandering factual background which rambles on for 109 paragraphs (paragraphs 24
 9 to133).

10 Nowhere in those 109 paragraphs is there a clear definition of what was done to
 11 the plaintiffs by any particular defendants. Instead the story wanders from the
 12 conclusions and generalizations regarding the actions of the Rockridge Manor defendants
 13 to musings about the actions of five attorneys (three of whom are not defendants in the
 14 suit), a superior court judge, and the involvement of the combined University of
 15 California at Berkeley defendants.

16 All of this is further confused by the fact that in Paragraphs 108 and 109, plaintiffs
 17 state that they accepted a settlement with the Rockridge Manor defendants.

18 In their five causes of action they lump all the defendants together in vague terms,
 19 without further explanation, as follows:

- 20 1. First Cause of Action: "These Defendants acted in concert or acted
 21 independently to cause the same harm."
- 22 2. Second Cause of Action: "These Defendants corrupted every and each
 23 Plaintiffs attorneys in covering up their violation of laws or violence."
- 24 3. Third Cause of Action: "These Defendants intentionally, maliciously,
 25 wantonly, recklessly breached their duties to Plaintiffs Chang and Sun."
- 26 4. Fourth Cause of Action: "All Defendants in Rockridge Manor, University
 27 Of California Berkeley, Attorney Pamela Zimba, and Attorney Albert
 28 Coombes, conspired together to defraud against Plaintiffs."

1 Complaint For Lack Of Jurisdiction Over The Subject Matter And/Or Failure To State A
2 Claim Upon Which Relief Can Be Granted And In The Alternative, For A More Definite
3 Statement to the plaintiffs herein by placing a true copy thereof in a sealed envelope with
4 first class postage prepaid and addressed as follows:

5 Christine Chang
6 Individually and as Guardian Ad Litem for Eric Sun
7 341 Tideway Drive, #214
8 Alameda, Ca. 94501

9 I caused such envelope to be placed for collection and mailing in the United States
10 Mail at Encino, California.

11 Dated: October 10, 2007

12 /s/ ALBERT COOMBES
13 ALBERT COOMBES
14 Pro Se Defendant
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